Supreme Court, U.S.
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NO. 97-277

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES KIRK AND MARSHA KIRK, DONNA SUE GALL, AND PATTY HUMMER, Together With the Remaining Property Owners Who are Signatories Hereto and Who are in the Caption of this Complaint, Petitioners.

v.

TOWN OF OSCEOLA, INDIANA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONDENT'S BRIEF IN OPPOSITION

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24 pp

QUESTIONS PRESENT FOR REVIEW

Respondent would point out to this Court that Petitioners' question #2 presented for review does not raise a federal question. Respondent submits that this question is not properly presented to this Court and need not be addressed by it. Furthermore, Petitioners' questions #1 and #3 were not properly raised at the state court level and do not reflect the basis of the decision of the highest state court. Therefore, this Court's jurisdiction under 28 U.S.C. Section 1257 cannot attach to this case.

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Conceded Matters 1

Jurisdiction 1

Statement of the Case 2

Reasons Why the Petition Should Be Denied 4

I. Petitioners Failed to Properly Raise Federal Questions in State Court 4

II. Independent and Adequate State Grounds Exist to Support Decisions of the Indiana Court of Appeals and Indiana Supreme Court, Thereby Precluding Jurisdiction of This Court Under 28 U.S.C.§ 1257 8

III. The State Court's Interpretation of State Law and Its Holding on the Merits of This Case Are Correct 12

Conclusion 18

TABLE OF AUTHORITIES

CASES

Arizona v. Evans, 514 U. S.1 (1995) 9

Bailey v. Anderson, 326 U.S. 203, 206-207 (1945) 4

Beck v. Washington, 369 U. S. 541, 549-550 (1962) 4,5

Boxton v. Lovell, 559 F. Supp. 979, 991 (S.D. Ind. 1983) 15

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) 7, 8

Cheek v. State, 567 N.E.2d 1192, 1195 (Ind. App. 1991) 5

Chidester v. Hobart, 631 N.E. 2d 908 (Ind. 1994) 5, 6, 15

City of Hobart v. Chidester, 596 N.E. 2d 1374, 1377 (Ind. App. 1992) 14

Clark v. Kenley, 646 N.E. 2d 76 (Ind. App. 1995) 14

Clarkson v. Dept. of Ins. of State of Indiana, 425 N.E. 2d 203 (Ind. App. 1981) 5

Coleman v. Thompson, 501 U.S. 772 (1991) 10, 11

Commissioner of Labor v. Gary Steel Products, Corp., 643 N.E.2d 407 (Ind. App. 1990) 16

Deaton v. City of Greenwood, 582 N.E. 2d 82 (Ind. App. 1991) 15

Ferguson v. Georgia, 365 U.S. 570, 572 (1961) 5

Fort Wayne Patrolman's Benev. Ass'n, Inc. v. City of Fort Wayne, 408 N.E. 2d 1295 (Ind. App. 1980) 5

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) 11

Garrod v. Garrod, 590 N.E. 2d 163 (Ind. App. 1992) 17

Harris v. Reed, 489 U.S. 255 (1989) 11, 12

Illinois v. Gates, 462 U.S. 213, 218-219 (1983) 7

Inner City Leasing & Trucking v. City of Gary, 759 F. Supp. 461 (N.D. Ind. 1990) 16

Kern v. Wolf, 622 N.E.2d 201, 203 (Ind. App. 1993) 5

Kirk v. Town of Osceola, 669 N.E. 2d 1060 (Ind. App. 1996) .. 9

Matter of Public Law No. 154-1990, 561 N.E.2d 791, 792 (Ind. 1990) 16, 17

McGoldrick v. Comethenie Generale Transatlantique, 309 U.S. 430, 434-435 (1940) 7

Michigan v. Long, 463 U. S. 1032, 1037 (1983) 8, 9, 10, 11

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 309 (1903) 5

Neudecker v. Neudecker, 566 N.E.2d 557, 562 (Ind. App. 1991) 17

Parker v. Illinois, 333 U.S. 571 (1948) 7

Swartz v. Scruton, 964 F.2d 607 (7th Cir. 1992) 16

Thompson v. Fernand Sesquicentennial Committee, Inc., 637 N.E.2d 178 (Ind. App. 1994) 14

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 9

Yoder v. Elkhart County Auditor, 632 N.E. 2d 369 (Ind. App. 1994) 16

STATUTES

United States Code Citations:

28 U.S.C.§1257 ..... 1, 4, 8, 11, 12

Indiana Code Citations:

5-3-1 13

5-3-1-2 ..... 13, 14, 15, 16, 17

36-4-3-7(a) 13

36-4-3-11 ..... 14, 16

ADDITIONAL AUTHORITIES

U. S. Constitution Amendment XIV Section 1 15

Indiana Constitution Article I, Section 12 15

Stern, Supreme Court Practice, 7th Edition, pg. 193 (1993) 12, 13

CONCEDED MATTERS

Pursuant to Supreme Court Rule 24.2, Respondent agrees with the following sections of the Petitioners' Petition for Writ of Certiorari and, therefore, does not include the same in its Brief in Opposition: Parties to the Preceding; Opinions Below; and Constitutional Statutory Provisions Involved.

However, with regard to the Petitioners' section labeled Constitutional Statutory Provisions Involved, Respondent would point out to this Court that the state and federal constitutional provisions set forth were not properly raised by the Petitioners at the state court level. Petitioner agrees that Respondents have raised constitutional questions under the Indiana and United States Constitutions but does not agree that those provisions apply to this case. It's analysis of this issue will be set forth in the first section of its Reasons Why Petition Should Be Denied.

JURISDICTION

Petitioner disagrees with Respondents' conclusion in their Jurisdiction section that this Court has jurisdiction to review this matter pursuant to 28 U.S.C. Section 1257(3)(a) for the following reasons: the federal question raised is not a substantial question; the federal questions were not properly raised by the Respondents in the state courts; and the state court's judgment rests on independent and adequate state grounds.

STATEMENT OF THE CASE

On May 3, 1993, Respondent, Town of Osceola, Indiana, passed an ordinance approving the annexation of certain real property situated adjacent to the town. Immediately after the passage of the ordinance, Respondent requested that the Mishawaka Enterprise, a newspaper which publishes legal notices in the relevant area, publish the ordinance once. However, the Mishawaka Enterprise believed that annexation ordinances were to be published twice and therefore published the ordinance on May 6, 1993, and on May 13, 1993. On July 8, 1993, Petitioners filed an action in the Superior Court of St. Joseph County, Indiana, remonstrating against the annexation. Indiana's statute on annexation required that the remonstrance petition had to be filed within 60 days of the "last publication." July 8 was within 60 days of May 13, but was not within 60 days of May 6.

On December 21, 1993, Respondent moved for Summary Judgment in its favor on the grounds that Petitioners' Complaint was not timely because the same was filed more than 60 days after the only required publication. Petitioners argued that their Complaint was timely, and alternatively that Respondent should be estopped from asserting the limitations period as a defense. On February 21, 1995, the Honorable William T. Means for the St. Joseph Superior Court granted Respondents' Motion for Summary Judgment finding that the legal publication notice statute required only one publication, that the second publication was surplusage, and that Petitioners' Complaint was not timely.

On March 22, 1995, Petitioners filed their appeal to the Indiana Court of Appeals. On August 26, 1996, the Court of Appeals affirmed the trial court's award of Summary Judgment in favor of Petitioner and stated that the only relevant inquiry was whether the notice statute required one or two publications. The Indiana Courtof Appeals held that only one publication was required and that

Petitioners' Complaint was not timely.

On September 25, 1996, Petitioners petitioned the Indiana Supreme Court to transfer this matter for reviewof the decision of the Court of Appeals of Indiana. On February 20, 1997, the Indiana Supreme Court denied Petitioners' Petition for Transfer withouta written opinion.

The Petitioners did not raise any constitutional or other federal issues at the trial court level. They also failed to fulfill their obligations under Supreme Court Rule 14(g)(i) to set forth when the federal question was raised in the trial court. This omission in their Petition is due to the fact that the federal questions alleged on appeal and presented to this Court were never properly raised at the trial court level in accordance with both Indiana law and federal law.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS FAILED TO PROPERLY RAISE FEDERAL QUESTIONS IN STATE COURT.

28 U.S.C. § 1257 requires that a substantial federal question be properly raised in the state court proceedings in order for this Court to have jurisdiction. If the state court does no more than discuss the interpretation of the state statute, without considering such interpretation in the light of a federal question properly presented to it, this Court cannot consider the federal issues. Beck v. Washington, 369 U.S. 541, 549-550 (1962). The case before this Court solely involves the statutory interpretation of a state statute by the Indiana Court of Appeals. This case does not involve constitutional issues that require this Court's time and interpretation. Petitioners improperly attempted to raise federal questions at the state appellate level after they lost at the trial court level. The Indiana Court of Appeals and the Indiana Supreme Court neither addressed these federal questions nor relied on federal law in interpreting the state statutes involved.

Respondent, Town of Osceola, Indiana, respectively requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Indiana Court of Appeals and Indiana Supreme Court's denial of transfer without opinion because Petitioners failed to properly raise their federal questions at the state court level. Petitioners cannot challenge the constitutionality of the legal notice and annexation statutes because they did not raise these challenges at the trial court level. The Indiana Court of Appeals and the Indiana Supreme Court, therefore, properly refused to address the Petitioners' constitutional challenges that were raised for the first time on appeal. This Court has stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was

due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Bailey v. Anderson, 326 U.S.203, 206-207 (1945). In Beck v. Washington, 369 U.S. 541,550 (1962), this Court recognized the reasonableness of a state supreme court's refusal "to consider constitutional attacks upon statutes not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute." Thus, if reasonable state procedural requirements are not followed, this Court should decline to exercise jurisdiction where the highest state court is completely silent on any federal question. Mutual Life Ins.Co. v McGrew, 188 U.S. 291, 309 (1903).

A party must follow the state procedures in raising a federal question, and any failure to follow such procedures should cause this Court to deny review. Ferguson v. Georgia, 365 U.S. 570, 572 (1961). Indiana courts have long disfavored litigants raising issues for the first time on appeal. Cheek v. State, 567 N.E. 2d 1192, 1195 (Ind. App. 1991). Issues not raised in the trial court are considered waived on appeal. Clarkson v. Dept. of Ins. of State of Indiana, 425 N.E. 2d 203 (Ind. App. 1981). Constitutional challenges to statutes are subject to this rule as well. Kern v. Wolf, 622 N.E. 2d 201, 203 (Ind. App. 1993); Fort Wayne Patrolman's Benev. Ass'n. Inc. v. City of Fort Wayne, 408 N.E. 2d 1295 (Ind. App. 1980). Therefore, constitutional challenges to state statutes cannot be raised for the first time on appeal. Kern, supra at 203.

In Chidester v. Hobart, 631 N.E. 2d 908 (Ind. 1994), remonstrators to an annexation did not raise any constitutional challenges to the statutes involved at the trial court level or in the Court of Appeals. Rather, they raised due process challenges for the first time in the Indiana Supreme Court. The Court held that the remonstrators' failure to raise these objections in the trial court precluded them from being raised on appeal. In so doing, the Court stated the following:

> Counsel for the remonstrators now wish to raise various constitutional objections to the annexation.*** Counsel for the remonstrators, however, have waived each of these claims. Counsel may not raise these issues for the first time on appeal ... much less for the first time on a subsequent appeal after a limited remand. Id. at 912, 913.

Petitioners in this case did not raise any constitutional objections to the statutes at issue in the trial court. Rather, they raise these challenges for the first time in their appeal to the Indiana Court of Appeals. Therefore, they have waived any constitutional arguments and Respondent respectfully submits that this Court cannot consider Petitioners' challenges to the constitutionality of the statutes at issue in this matter.

Also, Petitioners' Petition for Writ of Certiorari is not in compliance with Supreme Court Rule 14.1(g)(i). This rule states in pertinent part as follows:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal question is sought to be reviewed or raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears ...., so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a Writ of Certiorari. ....

The petitioners cannot comply with this rule and show this Court that any federal questions were timely and properly raised because the federal questions presented were not raised by Petitioners until they appealed the trial court decision to the Indiana Court of Appeals. This method of raising constitutional questions is improper. Consequently, the Indiana Court of Appeals and Indiana Supreme Court did not address those issues. In other words, no state court has decided an important federal question in this case pursuant to Supreme Court Rule 10. Likewise, this Court should not address the constitutional questions raised by Petitioners because they were improperly presented in the state courts. See Parker v. Illinois, 333 U.S. 571 (1948).

This Court has stated numerous reasons for refraining from deciding federal questions not properly presented or decided at the state court level. In Illinois v. Gates, 462 U.S. 213, 218-219 (1983), this Court quoted from McGoldrick v. Comthenie Generale Transatlantique, 309 U.S. 430, 434-435 (1940), the following:

> "... in cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state of this judicial action were are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in state court, consistently refuses to consider any

> grounds of attack not raised or decided in that Court."

In Cardinale v. Louisiana, 394 U.S. 437, 439 (1969), this Court stated the following:

> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, sincethe statutes may be construed in a way which saved their constitutionality. Or the issue may be blocked by an adequate state ground.

Therefore, because there is not substantial federal questions before this Court, it should deny the Petitioners' Petition for Writ of Certiorari.

II. INDEPENDENT AND ADEQUATE STATE GROUNDS EXIST TO SUPPORT THE DECISIONS OF THE INDIANA COURT OF APPEALS AND INDIANA SUPREME COURT, THEREBY PRECLUDING JURISDICTION OF THIS COURT UNDER 28 U.S.C. § 1257.

Even if this Court finds that Petitioners properly raised their constitutional questions at the state court level, under 28 U.S.C. § 1257, it is a well settled rule that this Court does not have jurisdiction to decide a case if the decision below rests on independent and adequate state ground. Michigan v. Long, 463 U.S. 1032, 1037 (1983). In Michigan v. Long, this Court established the following

standard in which to determine whether an independent and adequate state ground exists to support the decision by the highest state court:

> ....when ... a state court decision fairly appears to rely primarily on federal law, or to be interwoven with the federal law and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so. If a state court chooses merely to rely on federal precedents as precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If this state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-1041. The standard set forth in Michigan v. Long has been upheld and is the standard used today. See Arizona v. Evans, 514 U.S.1 (1995). In Michigan v. Long, this Court found that the Michigan Supreme Court rested its decision primarily on federal law. Id. at 1044. This Court reasoned that although there were references to the state constitution, it otherwise relied exclusively on federal law. Id. at 1037.

Unlike the reliance on federal law in Michigan v. Long, the Indiana Court of Appeals in this case relied purely on state statutory interpretation in deciding this case. Since the Indiana Supreme Court

denied the Petitioners' petition for transfer without opinion, the decision to be examined is the Indiana Court of Appeals ruling in Kirk v. Town of Osceola, 669 N.E. 2d 1060 (Ind. App. 1996). See Ylst v. Nunnemaker, 501 U.S. 797 (1991). The Indiana Court of Appeals made absolutely no reference to federal law when it decided this case. It merely reviewed the trial court's ruling of Summary Judgment in favor of the Respondents in this case and affirmed the statutory interpretation of the state statutes involved. It is abundantly clear the lower court's holding was based on independent and adequate state grounds. Therefore, this Court should not undertake to review the lower court's decision.

A case almost directly on point ~~is~~ Coleman v. Thompson, 501 U.S. 772 (1991). Although a criminal case, it involved the issue of whether state procedural grounds were both independent and adequate to support the lower court's decision. The standard set forth in Michigan v. Long, supra, a direct review case, was also applied in Coleman v. Thompson, a federal habeas case. Coleman v. Thompson, 501 U.S. at 734-736. In Coleman v. Thompson, a jury convicted Coleman of rape and capital murder and sentenced him to death for the murder. The trial court imposed the death sentence and the Virginia Supreme Court affirmed both convictions and the sentence. Coleman then filed a petition for a Writ of Habeas Corpus in Circuit Court, and the Circuit Court ruled against him on all claims. The Court entered its final judgment on September 4, 1986. Coleman then filed a Notice of Appeal with the Circuit Court on October 7, 1986, 33 days after the final judgment. The Commonwealth of Virginia filed a Motion to Dismiss arguing that he had not timely filed his Notice of Appeal. Virginia Supreme Court Rule 5:9(a) provided that no appeal would be allowed unless a Notice of Appeal has been filed with the trial court within 30 days of the final judgment. Coleman next filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Virginia. The District Court concluded that he had procedurally defaulted, and the United States Court of Appeals for the Fourth

Circuit affirmed. The Fourth Circuit held that the Virginia Supreme Court's decision rested on independent and adequate state grounds. Id. at 728-729. This Court affirmed the holding of the Court of Appeals for the Fourth Circuit. Id. at 729.

This Court reiterated the rule that it would " ... not review a question of federal law decided by the state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Id. (Citations Omitted). "This rule applies whether the state law ground is substantive or procedural." Id. (Citations Omitted). This Court stated that a habeas petitioner who fails to meet a state's procedural requirements for presenting federal claims has deprived the state courts of an opportunity to address those claims. Id. at 732. In Coleman v. Thompson, this Court did not apply the presumption set forth in Michigan v. Long, supra, and Harris v. Reed, 489 U.S. 255 (1989), because it did not "fairly appear" that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with federal law. Coleman v. Thompson, supra at 740. The Virginia Supreme Court opinion was based solely on Coleman's failure to meet the applicable state time requirements, and there was no mention of federal law in its opinion. Id. This Court stated that the dismissal was based solely on procedural grounds, independent of federal law. Id. at 744. In summary, the doctrine of adequate and independent state grounds requires that a federal court will not review a state court decision that rests on a state law ground, either substantive or procedural, that is independent of federal law and is adequate to sustain the decision. Fox Film Corp. v. Muller, 296 U.S. 207,210 (1935).

Like Coleman, Petitioners in this case lost because they did not follow the time requirements set forth in the applicable state statutes. The trial court's granting of Summary Judgment for Respondent in this case and the Indiana Court of Appeals affirmance of the trial court's decision was based purely on the interpretation of

the time limits set forth in the Indiana statutes. The Indiana Court of Appeals did not address any of the Petitioners' improperly raised federal questions and based its decision solely on state law and state statutes. Therefore, this Court does not have jurisdiction to review this case under 28 U.S.C. § 1257 and should deny the Petitioners' Petition for Writ of Certiorari.

Further, in Harris v. Reed, 489 U.S. 255, 263 (1989), this Court reiterated the rule that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Id. 263 (Citations Omitted). This Court concluded that the state court did not "clearly and expressly" rely on state procedural grounds for rejecting the Petitioners' ineffective-assistance-of-counsel claim because the state court addressed the Petitioners' federal chim on the merits, thereby, creating ambiguity by referring tostate law and at the same time relying on federal law. Id. at 266, n. 13. Unlike the state court in Harris v. Reed, no Indiana state court has addressed any of the petitioners' untimely federal questions. No Indiana state court has relied on federal law or interwoven federal law with Indiana state law. The Indiana Court of Appeals "clearly and expressly" held that its judgment rested on a state procedural bar. Independent and adequate state grounds exist to support the lower state courts' decisions. Therefore, this Court does not have jurisdiction to review this case under 28 U.S.C. Section 1257 and should deny the Petitioners' Petition for Writ of Certiorari.

III. THE STATE COURT'S INTERPRETATION OF STATE LAW AND ITS HOLDING ON THE MERITS OF THIS CASE ARE CORRECT.

Notwithstanding the independent and adequate state grounds of the state court's decision, the fact remains that Petitioners

improperly raised their federal questionsat the state court level, and, therefore, did not preserve them for this Court to review. As a result, Petitioners are essentially asking this Court to spend its time reviewing and interpreting state statutes. The Petitioners make this request because they believe the Indiana courts have committed errors in their interpretation of the applicable statutes in this case. However, correcting alleged interpretational errors of state statutes from lower state court decisions should not be the task of this Court. Stern, Supreme Court Practice, 7th Edition, pg. 193 (1993). This Court's workload and responsibility are too great to require it to review and correct every error by lower courts. Id. Nevertheless, the Respondent will address the Petitioners' allegations of error by the state courts and support the correctness of the state court's holding on the merits of this case.

Petitioners make three basic arguments in their section titled Reasons for Granting the Petition. First, Petitioners set forth an extended argument of what they perceive as the plain and ordinary meaning of the statutes involved. Although this argument goes to the merits of the Indiana Court of Appeals decision and is beyond the scope of what should be included in the Petition for Writ of Certiorari, Respondents feel compelled to address this argument.

Indiana has codified the requirements for publishing legal notices in Ind. Code 5-3-1, et seq. Like most legal notice publications, municipal annexation ordinances are published in the manner prescribed by Ind Code 5-3-1. Ind. Code 36-4-3-7(a). Ind. Code 5-3-1-2 sets forth the number of publications require for various notices and applies "when notice of an event is required to be given by publication in accordance with Ind. Code 5-3-1." The statute, at the time of the annexation ordinance at issue was published, read as follows:

> (h) if the event is one about which notice is required to be published after the event, notice shall

be published one time within 30 days after the date of the event.

(i) if the event is anything else, notice shall be published two times, at least one week apart, with the second publication made at least three days before the event.

Ind. Code 5-3-1-2(h)(i).

Courts must interpret a statute in the context of the whole act in such a manner as provides a harmonious result. Thompson v. Fernand Sesquicentennial Committee, Inc., 637 N.E. 2d 178 (Ind. App. 1994). When, as here, the statute to be construed is linked to another statute, the two statutes must be considered in a pari materia to create harmonious result. Clark v. Kenley, 646 N.E. 2d 76 (Ind. App. 1995).

Petitioners contend that the "event" referred to in this statute is the effectiveness of the annexation. This interpretation of the statute provides an absurd result. According to Indiana law, residents have 60 days to remonstrate from the date of publication. Ind. Code 36-4-3-11(a). If the event is the effectiveness of the annexation, the event is one which requires notice to be published before it takes place. Notice would then be published twice with the last notice to occur at least three days before the date the ordinance takes effect. Ind. Code 5-3-1-2(i).

According to Petitioners' construction of the statute, the remonstrators could conceivable file their petition up to 57 days after the annexation ordinance takes effect. The purpose of the remonstrance statute is to give residents an opportunity to object to annexation before it actually occurs. City of Hobart v. Chidester, 596 N.E. 2d 1374, 1377 (Ind. App. 1992). Thus, a construction of the statute which allows residence to abate the effectiveness of

annexation after it has already occurred is absurd.

The trial court properly construed the word "event" in the notice statute, as applied to annexation ordinances, to mean the date on which the annexation ordinance is passed. By construing the word "event" to mean the date of the passage of the ordinance, the event becomes one which requires publication only once after the date of passage. This interpretation allows residents a full 60 days from the date of the publication to file a remonstrance petition before the ordinance becomes effective. Only this interpretation harmoniously construes the annexation statute with the legal notice statute.

The Indiana Court of Appeals agreed with the trial court and found that only one notice was required. This interpretation is consistent with prior Indiana cases. See Deaton v. City of Greenwood, 582 N.E. 2d 82 (Ind. App. 1991). Therefore, the courts have given the statutes involved the only plain and ordinary meaning that is reasonable.

Second, the Petitioners argue that they were denied due process and fair notice. They state that the statutes involved in this case were so fundamentally vague as to deny them due process with regard to a property right. Petitioners argue thatthey were somehow deprived of a protected property interest by the annexation without having the opportunity to be heard prior to the alleged deprivation and that this deprivation without hearing was caused by inadequate procedural safeguards under Ind. Code 5-3-1-2, which is part of Indiana's annexation act. However, Petitioners cannot prevail on this argument because no protected property interest was deprived due to the annexation. This case involves the annexation of Petitioners' property, and annexation of property is not a taking of property nor does it deprive any person of his/her property. Chidester v. City of Hobart, 631 N.E. 2d 908, 913 (Ind. 1994). Furthermore, Petitioners were provided with notice of the annexation and the opportunity to

file an action to contest the same. Therefore, Petitioners were not deprived of any property right or denied due process of law.

A person's right to due process of law emanates from the United States Constitution and the Indiana Constitution. According to the former, "no State shall deprive any person of life, liberty, or property without due process of law ...." U.S. Constitution Amendment XIV Section 1. According to the latter, "every person, for injury done to him and his person, property, or reputation, shall have remedy by due course of law." Indiana Constitution Article I, Section 12. "The essence of a due process violation is the deprivation of a protected 'liberty' or 'property' interest without adequate procedural safeguards." Boxton v. Lovell, 559 F.Supp. 979, 991 (S.D.Ind. 1983). Thus, to state a viable due process claim, a party must generally demonstrate that it had a protectable property interest of which it was deprived without notice and an opportunity for a hearing. Inner City Leasing & Trucking v. City of Gary, 759 F.Supp.461 (N.D.Ind. 1990). Since Petitioners were not deprived of a protected property interest by the annexation, a procedural due process claim cannot stand, regardless of the process provided. See Swartz v. Scruton, 964 F 2d 607 (7th Cir. 1992).

Further, Petitioners were provided due process of law. Procedural due process only requires that remonstrators be given notice and an opportunity to be heard. Yoder v. Elkhart County Auditor, 632 N.E. 2d 369 (Ind. App. 1994). Such notice was given pursuant to Ind. Code 5-3-1-2 which requires that annexation ordinances be published once to indicated the effective date of the annexation. Ind. Code 36-4-3-11 affords Petitioners the ability to file an action for remonstrance within 60 days of the date of the publication, thereby entitling them to be heard. Therefore, even if petitioners were able to show a deprivation of a protectable property interest, they were provided notice and an opportunity to have their objections heard and were thereby provided due process of law.

Third, Petitioners argue that Ind. Code 5-3-1-2 is unconstitutionally vague. They reach this conclusion because this statute was subject to two different interpretations,that of Petitioners and that of the Indiana courts.

However, all statutes are clothed with a presumption of constitutionality. Commissioner of Labor v. Gary Steel Products, Corp., 643 N.E. 2d 407 (Ind. App. 1990). According to the Supreme Court of Indiana:

> "We begin our review by noting that every statute stands before this Court cloaked the presumption of constitutionality ... It is our duty to bring it into harmony with constitutional requirements, if the language permits. If it is capable of any constitutional interpretation, it must be upheld."

Matter of Public Law No. 154-1990, 561 N.E. 2d 791,792 (Ind. 1990) (Citations Omitted).

Under basic principles of due process law a statute is unconstitutionally vague only if individuals of ordinary intelligence must guess at its meaning and differ as to its application. Garrod v. Garrod, 590 N.E. 2d 163 (Ind. App. 1992). Petitioners contend that the Indiana statute requires ordinances to be published twice. The Indiana courts found that the statute requires publication only once. Petitioners' construction of the statute leads to an absurd result that a remonstrance petition could be filed after the effective date of the ordinance; a result clearly not intended by the legislature and not in harmony with the annexation act. The Indiana courts' interpretation leads to a reasonable result in harmony with the intent in which it was written. Where a statute is susceptible to more than one interpretation, but only one interpretation is reasonable, the statute is not unconstitutionally vague. Neudecker v. Neudecker, 566 N.E. 2nd

557, 562 (Ind. App. 1991) ("If the statute can be made constitutionally definite by reasonable construction, the court's duty is to give the statute that construction."). Therefore, Ind. Code 5-3-1-2 is not unconstitutionally vague simply because the Petitioners construed it in an unreasonable manner.

In conclusion, Petitioners arguments on the merits of this case are incorrect, and the state courts' interpretation and application of state statutes are correct and internally consistent.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests this Court to deny the Petitioners' Petition for Writ of Certiorari.

Dated: September 12, 1997

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